United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-6097

To be argued by
BENJAMIN I. COHEN
LAW STUDENT INTERN
PURSUANT TO STUDENT PRACTICE RULE § 46(e)

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6097

P/S

GARON CAMASSAR, Administrator, c.t.a., d.b.n.
OF THE ESTATE OF CARVEL P. GRAMLICH,
Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE DEFENDANT-APPELLEE

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Statement of the Issues

Under the Federal Tort Claims Act may plaintiff seek damages for the wrongful death of an active duty U.S. Naval Officer, plaintiff's decedent, the death allegedly the result of a defective roadway on a pier owned and controlled by the U.S. Navy? The question presented is whether the District Court erred in holding that the suit was barred under *Feres* v. *United States*, 340 U.S. 135 (1950).

Statement of the Case

1. Nature of the Case

Plaintiff's claim was brought under the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b) and 2671 *et seq.* seeking damages for the wrongful death of plaintiff's decedent who, at the time of his death, was a Chief Petty

Officer on active duty with the U.S. Navy. His death resulted from an accident wherein the truck in which he was riding, driven by a fellow Chief Petty Officer, crashed off a pier at the U.S. Naval Ammunition Depot, Earle, New Jersey.

2. Proceedings

Following the government's denial of an administrative claim for damages, this suit was initiated (Appellant's Appendix, at 4a-6a). The Government's Answer (Appellant's Appendix, at 7a) denied negligence, asserted that plaintiff's decedent assumed the risk in riding in a vehicle operated by an intoxicated fellow Chief Petty Officer, and claimed that the suit was barred under *Feres* v. *United States*, 340 U.S. 135 (1950). The parties entered into a stipulation of facts (Appendix, at 9a-10a), and the government then moved for Summary Judgment (Appendix, at 11a).

3. Disposition in United States District Court

United States Magistrate Arthur H. Latimer rendered a proposed ruling which concluded that the suit was barred under *Feres*, *supra*, which held that there was no genuine issue of fact material to that conclusion, and which granted the Motion for Summary Judgment (Appendix, at 14a-22a).

The United States District Court, Newman, J., adopted Magistrate Latimer's proposed ruling and granted the government's Motion for Summary Judgment (Appendix, 12a-13a). This appeal followed.

4. Facts

The stipulation (Appendix, at 9a-10a) indicates that in early 1972 plaintiff's decedent Carvel Gramlich was a Chief Torpedo Mate on the crew of a U.S. Naval ship

homeported at Groton, Connecticut. On February 16, 1972 the ship was docked at the U.S. Naval Ammunition Depot in Earle, New Jersey. Gramlich, with other Naval personnel, was on authorized liberty on February 16, 1972 and was at the Petty Officer's Club from about 2:30 P.M. to about 8:30 to 9:00 P.M. They attended an initiation party at the Club from about 4:00-4:15 P.M. to about 5:45 P.M. and stayed at the bar of the Club until about 8:30 to 9:00 P.M. About 9:45 P.M. Gramlich was a passenger in a truck owned and driven by Charles Klobenzer, also a Navy Chief Petty Officer. The Complaint (Appendix, at 4a-6a) alleges that the accident occurred when the truck skidded off a pier at the Naval Ammunition Depot and went into the water. Gramlich, a passenger in the truck, died as a result.

LEGAL ARGUMENT

I.

Summary.

The District Court's opinion should be affirmed by this Court because (1) Congress has established an alternative scheme for compensating for the death of Military personnel and has not authorized actions as here brought by plaintiff; (2) the accident occurred on government property, a naval base; (3) litigation of the claim would undermine military discipline.

II.

Supreme Court Decisions.

The Supreme Court has four times considered suits involving the military under the Federal Tort Claims Act. In *Brooks* v. *United States*, 337 U.S. 49 (1949) the Su-

preme Court held that two servicemen in a private car struck on a public highway by a U.S. Army truck driven by a civilian employee could sue. A year later a unanimous (as to the result) Supreme Court held, in *Feres, supra,* that suit is barred when the claimant was injured in a barracks fire or in a military hospital, as the injury did not arise out of, nor in the course of, activities incident to service, *Id.* at 146. The Court distinguished *Brooks* by noting (at 146) that Brooks was on furlough, on a highway, and "under compulsion of no orders or duty and on no military mission." See also *Snyder* v. *United States,* 118 F. Supp. 585 (D. Maryland 1953), modified *sub nom., United States* v. *Guyer,* 218 F.2d 266 (4th Cir. 1954), reinstated *per curiam* 350 U.S. 906 (1955) (awarding damages to serviceman stemming from an accident in which a military plane crashed into his privately owned home). In *United States* v. *Brown,* 348 U.S. 110 (1954) a divided Supreme Court (6 to 3) allowed a claim by a civilian who was injured in a Veteran's Hospital in 1951 during treatment related to an injury he had suffered in 1944 while on active military duty. The case was deemed controlled by *Brooks* and not by *Feres* because Brown was a civilian, though a discharged veteran, and he was not on active duty or subject to military discipline and thus his injuries "did not arise out of or in the course of military duty", nor was the negligent act "incident to the military service," (at 113). The criterion thus applied was whether or not the injury was sustained incident to service. All of the surrounding circumstances would control the determination.

In *United States* v. *Muniz,* 374 U.S. 150 (1963), a Federal Prisoner was held not to be excluded from a right of recovery for injuries sustained in prison, a situation held not to be controlled by *Feres.* The principal reasons for *Feres* were restated (*Id.* at 159):

(a) There was no comparable existing cause of action by which a military man could sue a state which maintained a military organization.

(b) There was a comprehensive provision by which the government provided compensation for the injury.

(c) The military had not submitted a substantial number of private bills for compensation to Congress.

(d) The disadvantage to the military organization from the intervention of state law between a military person and his superiors or the organization.

(e) The vagaries between state laws which would control a military person who has no choice of location.

The best explanation of *Feres* is the "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results . . . [if such] suits . . . were allowed." (*Id.*, at 162).

III.

Courts in other Circuits have barred suits when accidents occur on military bases.

Applying the "incident to service test", the Circuit Courts have consistently barred suits by military personnel where the occurrence took place on a military base or equivalent, without regard to the claimant's precise military status at the time. A military person has to come and go to his duty station. That is an incident to his service. On any base he is subject to that base's command, once again an incident of his service. It has been consistently held that when at a place in which there is some vestige of a command function, i.e. on a military base reservation and thus a depot reserved for military

use, there is sufficient connection to one's service to be barred from bringing suit. *Hall* v. *United States*, 451 F.2d 353 (1st Cir. 1971) *per curiam* (barring suit for an injury allegedly suffered in a military hospital); *Henning* v. *United States*, 446 F.2d 774 (3rd Cir. 1971), *cert. den.* 404 U.S. 1016 (1972) (barring suit for an injury related to alleged negligence in a military hospital); *Buckingham* v. *United States*, 394 F.2d 483 (4th Cir. 1968) *per curiam* (barring suit for an injury allegedly suffered in a military hospital); *Shults* v. *United States*, 421 F.2d 170 (5th Cir. 1969) *per curiam* (barring suit for an injury allegedly suffered in a military hospital while on liberty); *Lowe* v. *United States*, 440 F.2d 452 (5th Cir. 1971) *per curiam*, *cert. den.* 404 U.S. 833 (1971) (barring suit for an injury allegedly suffered in a military hospital); *Knight* v. *United States*, 361 F. Supp. 708 (W.D. Tenn. 1972) *aff'd.* without opinion 480 F.2d 927 (6th Cir. 1973) (barring suit for death from drowning in swimming pool at Naval Base while on authorized liberty); *Herreman* v. *United States*, 476 F.2d 234 (7th Cir. 1973) (barring suit for death resulting from crash of military airplane while on leave); *Chambers* v. *United States*, 357 F.2d 224 (8th Cir. 1966) (barring suit for injury in swimming pool on military base); *United States* v. *United Services Automobile Association*, 238 F.2d 364 (8th Cir. 1956) (barring suit when military plane crashed into serviceman's car parked on military base); *Archer* v. *United States*, 217 F.2d 548 (9th Cir. 1954), *cert. den.* 348 U.S. 953 (1955) (barring suit when cadet who was on leave was killed while a passenger in a military airplane); *Henninger* v. *United States*, 473 F.2d 814 (9th Cir. 1973), *cert. den.* 414 U.S. 819 (1973) (barring suit for injury allegedly suffered in a military hospital); *Coffey* v. *United States*, 324 F. Supp. 1087 (S.D. Cal. 1971), *aff'd. per curiam* 455 F.2d 1380 (9th Cir. 1972) (barring suit over death of serviceman who was on liberty when accident occurred at intersection of government-maintained private

road and railroad track within a military reservation); *Harten* v. *Coons*, 502 F.2d 1363 (10th Cir. 1974), *cert. den.* 420 U.S. 936 (1975) (barring suit for an injury allegedly suffered in a military hospital); *Gursley* v. *United States*, 232 F. Supp. 614 (D. Col. 1964) (barring suit by serviceman who was on three day pass and was injured in housing on military base). Against these decisions from all the other circuits, appellant cites only one case from another circuit in which a suit was permitted for an injury occurring on a military base. *Downes* v. *United States*, 249 F. Supp. 626 (E.D.N.C. 1965). (Suit permitted by U.S. Marine who was scheduled to be discharged from the Marines 11 days after the date of the accident).

A second pattern that emerges is that lower courts may permit suits when the accident occurs off a military base, i.e., removed from an exclusive command function. *Hand* v. *United States*, 260 F. Supp. 38 (D. Ga. 1966) (permitting suit for injury occurring in accident on public highway that traversed a military base and was maintained by Georgia); *Knecht* v. *United States*, 242 F.2d 929 (3rd Cir. 1957) (permitting suit for injury occurring in accident on public highway in Alaska); *Snyder*, *supra*. (permitting suit for injuries occurring when military airplane hits house outside military base); *Barnes* v. *United States*, 103 F. Supp. 51 (W.D. Ky. 1952) (permitting suit for injuries occurring in accident on public highway). These cases can be rationalized to *Feres* as the occurrence was not incident to a man's service. The claimant's presence at the locus was not incidental to the obligations of his service.

Mills v. *Tucker*, 499 F.2d 866 (9th Cir. 1974), *per curiam* apparently reflects the 9th Circuit's determination, as stated in *Henninger*, *supra*, (at 816), to establish "a clear line" based on location. *Mills* permits a suit for

an injury occurring in an accident on a *publicly used* (emphasis added) highway maintained by the U.S. Government and adjacent to a military base; there is nothing in the record of the case at bar, however, that indicates that the pier at the Naval Ammunition Depot was open to the public. Suits involving an accident on a military base are barred by the 9th Circuit even when the claimant is on liberty. *Coffey, supra.*

This Court has sustained the government's position in the case at bar, based on *Feres, supra*, but without further elaboration. *Norris* v. *United States*, 229 F.2d 439 (2nd Cir. 1956) *aff'd. per curiam*, a district court decision, 137 F. Supp. 11 (E.D.N.Y. 1955), barring a suit for a death that occurred while a serviceman was on active duty on a military base. See also *Boyd* v. *United States*, Civil No. 15,384 (D. Conn. 1973), *aff'd. without opinion* 493 F.2d 1397 (2nd Cir. 1974) and *Healy* v. *United States*, 192 F. Supp. 325 (S.D.N.Y., 1961), *aff'd per curiam* 295 F.2d 958 (2nd Cir. 1961).

IV.

This claim should be barred because the accident occurred on a military base, litigation as to liability will damage military discipline, and Congress has provided an alternative means for compensating the plaintiff.

In view of the "physical location," the Court below should be sustained and the Appeal denied, as the accident's locus made it an incident of the service of plaintiff's decedent. He was, at the time, subject to Naval Command. The Government's Answer admitted Plaintiff's allegation that the Government "owned, possessed, and controlled" the Naval Depot at which the pier was located.

(Government's Answer and Plaintiff's Complaint at Appellant's Appendix to Brief, at 7a and 4a).

Suit should also be barred under the "effect on discipline" rationale articulated in *Brown*, *supra* at 112. If this suit were to be tried, an issue would be whether Koblenzer was intoxicated and, if so, whether Gramlich knew, or reasonably should have known, of his intoxication at the time of the accident. This is true regardless of whether the case would be tried under New Jersey Law, *Petrone* v. *Margolis*, 20 NJ Super 180, 89 A.2d 476 (Appeal Division 1952) (affirming jury verdict that passenger is barred from recovery because he voluntarily and knowingly rode in a motor vehicle operated by an intoxicated driver) or under Connecticut law, *Craig* v. *Dunleavy*, 154 Conn. 100, 221 A.2d 855 (1966) (passenger cannot recover if he knowingly rode in a motor vehicle operated by an intoxicated driver). There would be the need for the testimony of military personnel as to whether the government was negligent in its maintenance of the pier. This testimony might severely jeopardize military discipline. As the Supreme Court said in analyzing the Constitutional rights of prisoners, *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) "the American adversary trial presumes contestants who are able to cope with the pressures and aftermath of the battle" (at 568). Analogous considerations are relevant in analyzing the Federal Tort Claims Act. Appellant concedes (Brief, at 17) that this case raises a "challenge" and an "intrusion upon matters of military command." On the other hand, in *Brooks*, *supra*, both one passenger in the car and the driver of the U.S. Army truck were civilians; thus the testimony would be limited to the driver's conduct. In the case at bar, almost all of the potential witnesses would be military personnel and the challenge would be to the performance of several naval personnel in the chain of command of the

Naval Ammunition Depot. Unlike the situation with prisoners in *Muniz, supra,* (at 163) there is no State experience from which this Court could conclude that allowing this suit will not adversely affect military discipline.

Unlike a federal prisoner military personnel have voluntarily become "government employees." As the Court of Appeals of the 4th Circuit noted, "Congress has established a complete and comprehensive administrative system of compensation to take care of the death of, or injuries to, servicemen . . . it has made no distinction between injuries received while a soldier was on furlough or leave, and injuries received while a soldier was on active duty. If the injury or disease is incurred during the period of his military service, it is service-connected, and is compensable even though not service-caused." *United States* v. *Brooks,* 169 F.2d 840 (4th Cir. 1948) (at 842, 843). Judge A. Hand expressed a similar insight in affirming the dismissal of the suit in *Feres* v. *United States,* 177 F.2d 535 (2nd Cir. 1949) "If more than the pension system had been contemplated to recompense soldiers engaged in military service we think that Congress would not have left such relief to be implied from the general terms of the Tort Claims Act." (at 537). While not included in the record before the District Court, Government records indicate that, in addition to any life insurance proceeds, Gramlich's widow received from the Government, within three months of his death, two payments totalling $3,492; her monthly pension pursuant to 38 U.S.C. § 411 *et. seq.* has been increased from $271 in February, 1972 to its current level of $356.

V.

This Court should not focus on Decedent's precise military status at time of accident.

It is true that *Wilcox* v. *United States*, 117 F. Supp. 119 (S.D.N.Y. 1953) denied the Government's Motion for Summary Judgment because there was a dispute as to deceased's "precise military status". Absent the claimant's clearly being a civilian at the time of the injury, as in *Brown, supra*, this approach has not been widely used by the Courts in the last 20 years, perhaps because civilian courts are unable easily to distinguish the nuances in different types of military status, such as "authorized liberty" in *Knight, supra*, and in the case at bar, "liberty" in *Coffey, supra*, "three day pass" in *Gursley, supra*; "leave" in *Herreman, supra*, and *Archer, supra*, and "active duty" in *Feres, supra*. While Gramlich and Koblenzer may not have been obeying any specific military order at the time of the accident, they were in New Jersey pursuant to military orders and were subject at the time of the accident to any specific military orders that might have been given to them, including any by the Naval Ammunition Depot Command.

CONCLUSION

The overwhelming number of reported decisions have relied on *Feres, supra* and have barred suits by military personnel. These reported decisions reflect a desire to establish a "clear line" (no suits when alleged negligent act occurs on a military base), a perception that litigation over negligence and assumption of risk can jeopardize military discipline, and an understanding that Congress provided an alternative way of compensating military personnel for accidents. For these reasons and for the reasons given in the District Court's opinion, this Court should affirm the judgment of the District Court.

Respectfully submitted,

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Pursuant to Student Practice Rule § 46(e)

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No. 75-6097

Garon Camassar, Administrator, cta, dbn,
of the Estate of Carvel P. Gramlich
Plaintiff-Appellant

v.

United States of America
Defendant-Appellee

AFFIDAVIT OF SERVICE BY MAIL

tephen Zedalis, being duly sworn, deposes and says, that deponent
t a party to the action, is over 18 years of age and resides at 47-19 194th Street
lushing, N.Y.

That on the 9th day of January, 1975, deponent
d the within Brief of the Defendant-Appellee

Thomas B. Wilson, Esq.; Suisman, Shapiro, Wool, & Brennan, P.C.
1028 Poguonnock Road
Groton, Connecticut 06340

rney(s) for the Appellant in the action, the address designated by said attorney(s) for the
ose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post
official depository under the exclusive care and custody of the United States Post Office department
in the State of New York.

Stephen Zedalis

rn to before me,

9th day of January 1975

William J. Bachman

WILLIAM J. BACHMAN
Notary Public, State of New York
N. 30-5137735
Qualified in Nassau County
Commission Expires March 30, 1976